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DEPARTMENT OF JUSTICE

28 CFR Part 58

Docket No: EOUST 105

RIN 1105-AB30

**Procedures for Completing Uniform Periodic Reports in
Non-Small Business Cases Filed Under Chapter 11 of Title 11**

AGENCY: Executive Office for United States Trustees (“EOUST”), Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice, through its component, EOUST, is issuing this notice of proposed rulemaking (Rule) pursuant to Section 602 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The BAPCPA requires the Department to issue rules requiring uniform periodic reports (Periodic Reports) by debtors in possession or trustees in cases under chapter 11 of title 11. The BAPCPA requires the Rule to strike the best achievable practical balance between the reasonable needs of the public for information about the operational results of the Federal bankruptcy system, undue burden, and appropriate privacy concerns and safeguards.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until Midnight Eastern Time at the end of that day.

ADDRESSES: To ensure proper handling of comments, please reference “Docket No. EOUST 105” on all electronic and written correspondence. The Department encourages that all comments be submitted electronically through www.regulations.gov using the electronic comment form provided on that site. An electronic copy of this document is also available at the www.regulations.gov website for easy reference. The proposed Periodic Reports mandated by this regulation, and their accompanying instructions, may be viewed on the United States Trustee Program’s website at http://www.justice.gov/ust/eo/rules_regulations/index.htm. Paper comments that duplicate the electronic submission are not necessary as all comments submitted to www.regulations.gov will be posted for public review and are part of the official docket record. Should you, however, wish to submit written comments via regular or express mail, they should be sent to the EOUST, 441 G Street N.W., Suite 6150, Washington, D.C. 20530.

FOR FURTHER INFORMATION CONTACT: Ramona D. Elliott, Deputy Director/General Counsel, Nan R. Eitel, Associate General Counsel for Chapter 11 Practice, or Larry Wahlquist, Office of the General Counsel, at (202) 307-1399 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at www.regulations.gov. Such information includes personal identifying information (such as your name and address) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this Rule. Nevertheless, if you want to submit personal identifying information (such as your name and address) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on www.regulations.gov.

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency’s public docket file, but not posted online. If you wish to inspect the agency’s public docket file in person by appointment, please see the paragraph above entitled “For Further Information Contact.”

Discussion of the Rule

_____The BAPCPA requires the Rule to strike the best achievable practical balance between: (1) the reasonable needs of the public for information about the operational results of the Federal bankruptcy system; (2) economy, simplicity, and lack of undue burden on persons with a duty to file these reports; and (3) appropriate privacy concerns and safeguards. These Periodic Reports

are to be used by all chapter 11 debtors who do not qualify as a “small business debtor” as defined in the Bankruptcy Code at 11 U.S.C. 101(51D). Pursuant to Section 435 of the BAPCPA, the Judicial Conference of the United States has developed a periodic report, entitled Official Form B 25C “Small Business Monthly Operating Report,” for use by small business debtors as defined by the Bankruptcy Code. *See* 11 U.S.C. 101(51D), 308.

The administration of chapter 11 bankruptcy cases is entrusted to the debtor in possession pursuant to 11 U.S.C. 1107(a) or, if circumstances warrant, a trustee appointed pursuant to 11 U.S.C. 1104. Debtors in possession and trustees must account for the receipt, administration, and disposition of all property; provide information concerning the estate and the estate’s administration as parties in interest request; and file periodic reports and summaries of a debtor’s business, including a statement of receipts and disbursements, and such other information as the United States Trustee or the United States Bankruptcy Court requires. 11 U.S.C. 1106(a)(1), 1107(a); Fed. R. Bankr. P. 2015 (a)(2), (a)(3). The periodic report filed prior to the confirmation of a plan of reorganization is generally known as the Monthly Operating Report (MOR). The periodic report filed subsequent to the confirmation of a plan of reorganization is generally known as the Post-confirmation Report (PCR).

Periodic reports are currently filed in bankruptcy courts across the country and, in each jurisdiction, they serve essentially the same purpose and convey the same information. The format of the reports and attachments, however, may vary from jurisdiction to jurisdiction. With the passage of the BAPCPA, Congress directed the Attorney General to draft rules creating nationally uniform forms for chapter 11 periodic reports for non-small business cases. Congress mandated that certain data elements be included within the reports and granted the Attorney

General the discretion to include additional data elements. The Attorney General delegated this authority to the Director of EOUST. In response to this congressional mandate, the Director publishes this Rule, which proposes to require debtors in possession and chapter 11 trustees in non-small business cases to utilize forms developed to produce nationally uniform periodic reports rather than the local reports currently in effect. When finalized, this Rule will not impose requirements on the general public; it imposes requirements only upon chapter 11 debtors in possession and trustees who are supervised by United States Trustees.

UST Form 11-MOR and UST Form 11-PCR are the uniform Periodic Reports forms required by this Rule. The data elements in UST Form 11-MOR that are required by Congress are numbered (1) – (4), (8), and (9). In UST Form 11-PCR, Congress required data element number (4); all other data elements have been included in the EOUST’s discretion via the Attorney General’s delegation of authority. The Periodic Reports that are prepared using these forms will facilitate the review of a debtor in possession’s or trustee’s case administration, which will assist in maintaining the public’s trust in the bankruptcy system.

The information collected by UST Form 11-MOR will be utilized by the court, creditors, the United States Trustee and other parties in interest to evaluate a chapter 11 debtor’s progress through the bankruptcy system, including the likelihood of a plan of reorganization being confirmed and whether the case is being prosecuted in good faith. Specifically, information collected by UST Form 11-MOR will assist the court and parties in interest in ascertaining the following: (1) whether there is a substantial or continuing loss to or diminution of the bankruptcy estate; (2) whether there is a reasonable likelihood of rehabilitation; (3) whether there exists gross mismanagement of the bankruptcy estate; (4) whether the debtor may have violated a cash

collateral order or other order of the bankruptcy court; (5) whether the debtor is timely paying postpetition taxes; (6) whether the debtor is engaging in the unauthorized disposition of assets through sales or otherwise; (7) whether the debtor is complying with its obligation to maintain appropriate insurance so as to avoid a risk to the estate or to the public; (8) whether the debtor is complying with its obligation to pay fees due under 28 U.S.C. 1930; and, (9) in the case of an individual debtor, if applicable, whether the debtor is complying with his or her obligation to pay domestic support obligations. This information contributes to the decision by the United States Trustee, or by a creditor or some other party in interest, to file a motion to dismiss the bankruptcy case or seek conversion of the case to a case under chapter 7. *See, e.g.*, 11 U.S.C. 1112(b)(4)(A), (B), (C), (D), (E), (I), (J), (K), and (P).

The information collected by UST Form 11-PCR will be utilized to evaluate whether a chapter 11 debtor is performing as anticipated under a confirmed plan. Specifically, information collected by UST Form 11-PCR will assist the court and parties in interest in ascertaining the following: (1) whether a debtor is able to effect substantial consummation of a confirmed plan; (2) whether the debtor is or is not in material default under a confirmed plan; and (3) whether the debtor is paying fees required under 28 U.S.C. 1930. If the debtor fails to perform under the confirmed plan, the United States Trustee, creditors, or other parties in interest may bring an appropriate motion to dismiss the case, revoke a confirmed plan, or convert the case to a case under chapter 7. *See* 11 U.S.C. 1112(b)(4)(K), (M), and (N); 11 U.S.C. 1144.

The use of these Periodic Reports will accomplish Congress's mandate to develop uniform forms for periodic reports as directed in the BAPCPA. The Periodic Reports will include all of the types of information required to be collected under the statute. Much of that

information is already collected in the current forms, but not in a way that facilitates the national compilation of the data. Because the Periodic Reports will be uniform, they may be data-enabled to facilitate the national compilation of the data delineated in the statute. This will facilitate an evaluation of the efficiency and practicality of the bankruptcy system, and may also assist Congress when making policy decisions, without imposing significant additional burdens upon trustees and debtors in possession. Moreover, the Periodic Reports will include sufficient information to inform creditors and other interested persons of the debtor's financial affairs, but they are still concise enough so as to provide ready, meaningful access to the information through the Internet or other means.

Periodic Reports shall be filed as a "smart form" with the United States Bankruptcy Court in which the chapter 11 case is pending via the court's Case Management/Electronic Case Filing System (CM/ECF). A "smart form" is a document that is data-enabled. When the document is saved into the industry standard Portable Document Format (PDF), stored data tags are then available for extraction and searching. When a form is not data-enabled, where the PDF is simply an image of the form, the data is not uniformly available for searching or extraction. The data-enabled form builds upon the existing Adobe PDF/A standard (Version 1.4). Once the Periodic Reports are finalized, debtors in possession, chapter 11 trustees, and members of the public may obtain blank "smart form" Periodic Reports from the United States Trustee Program website at www.justice.gov/ust.

The Periodic Reports, once filed in an active bankruptcy case by a debtor in possession or trustee, will be available to the general public at the office of the clerk of the United States Bankruptcy Court where a case is pending during the hours established by the bankruptcy court

clerk. Members of the public should contact the clerk's office of individual United States Bankruptcy Courts to obtain information about the policies and procedures for inspection of Periodic Reports filed in any particular case. Periodic Reports filed in cases are also available through the Internet by accessing the website for the Administrative Office of the United States Courts known as Public Access to Court Electronic Records (PACER) at www.pacer.psc.uscourts.gov. In order to access court records through PACER, users must register and obtain a user name and password. In addition, users must pay a fee for obtaining records through PACER.

Executive Orders 12866 and 13563 - Regulatory Review

This Rule has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review" section 1(b), Principles of Regulation and in accordance with Executive Order 13563 "Improving Regulation and Regulatory Review" section 1(b) General Principles of Regulation. The Department has determined that this Rule is not a "significant regulatory action" and, accordingly, this Rule has not been reviewed by the Office of Management and Budget (OMB).

The costs considered in this regulation include the time incurred by chapter 11 debtors and trustees to complete the Periodic Reports. This information is already collected in most districts through locally generated report forms. Additional costs, if any, should be negligible.

It is estimated that the cost to the government for developing these Periodic Reports is approximately \$67,000. The estimated cost to develop a system to store information extracted from these reports and to analyze the data is approximately \$208,000. Over the next several years, the EOUST anticipates utilizing base resources available for information technology to

meet the costs associated with developing the Periodic Reports and a system to store the information extracted from the reports. There will be no additional cost to the government or to the public. In fact, this Rule will reduce the costs to the government in reviewing and analyzing the information submitted by chapter 11 debtors in possession and chapter 11 trustees. Because the Periodic Reports will be data enabled, the current system of manual review and analysis will be replaced by a less time intensive, more automated process.

Executive Order 13132

This Rule will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this Rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Director has reviewed this Rule and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that chapter 11 small business debtors are not required to complete these Periodic Reports. Pursuant to Section 435 of the BAPCPA, the Judicial Conference of the United States has developed a periodic report, entitled Official Form B 25C “Small Business Monthly Operating Report, for use by small business debtors as defined by the Bankruptcy Code. *See* 11 U.S.C. 101(51D), 308.

Paperwork Reduction Act

These Periodic Reports are associated with an open bankruptcy case. Therefore, the exemption under 5 C.F.R. 1320.4(a)(2) applies.

Unfunded Mandates Reform Act of 1995

This Rule does not require the preparation of an assessment statement in accordance with the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531. This Rule does not include a federal mandate that may result in the annual expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of more than the annual threshold established by the Act (\$123 million in 2005, adjusted annually for inflation). Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This Rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 *et seq.* This Rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, and innovation; or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Privacy Act Statement

28 U.S.C. 589b authorizes the collection of the information in the Periodic Reports. As part of the debtor in possession's or trustee's reporting obligations, the United States Trustee will review the information contained in these reports. The United States Trustee will not share the information with any other entity unless authorized under the Privacy Act, 5 U.S.C. 552a *et seq.*

EOUST has published a System of Records Notice that delineates the routine use exceptions authorizing disclosure of information. See 71 F.R. 59818, 59819 (Oct. 11, 2006), JUSTICE/UST-001, “Bankruptcy Case Records and Associated Files.” Providing this information is mandatory under 11 U.S.C. 704.

List of Subjects in 28 CFR Part 58

Bankruptcy; Trusts and Trustees

For the reasons set forth in the preamble, 28 CFR part 58 is proposed to be amended as set forth below.

PART 58--[AMENDED]

1. The authority citation for Part 58 continues to read as follows:

Authority: 5 U.S.C. 301, 552; 11 U.S.C. 109(h), 111, 521(b), 727(a)(11), 1141(d)(3), 1202; 1302, 1328(g); 28 U.S.C. 509, 510, 586, 589b.

2. Add § 58.8 to read as follows:

§ 58.8 Uniform Periodic Reports in Cases Filed Under Chapter 11 of Title 11.

(a) *Scope.* The requirements of this section apply to all chapter 11 debtors who do not qualify as a “small business debtor” under 11 U.S.C. 101(51D).

(b) *UST Form 11-MOR, Monthly Operating Report.* Debtors in possession (debtor) and chapter 11 trustees (trustee) must file with the court and serve upon the United States Trustee, each member of any Official Committee of Unsecured Creditors, and any governmental unit charged with responsibility for collection or determination of any tax arising out of such

operation, monthly operating reports using UST Form 11-MOR (MOR). The MOR must contain the following:

- (1) Information about the industry classification, published by the Department of Commerce, for the businesses conducted by the debtor;
- (2) Length of time the case has been pending;
- (3) Number of full-time employees as of the date of the order for relief and at the end of each reporting period since the case was filed;
- (4) Cash receipts, cash disbursements, and profitability of the debtor for the most recent period and cumulatively since the date of the order for relief;
- (5) Asset and liability status as of the end of the reporting period;
- (6) Assets sold or transferred outside the ordinary course of business (with or without court approval) during the reporting period and cumulatively since the date of the order for relief;
- (7) Income statement, commonly referred to as a Statement of Operations;
- (8) All professional fees approved by the court in the case for the most recent period and cumulatively since the date of the order for relief (separately reported, for the professional fees incurred by or on behalf of the debtor, between those that would have been incurred absent a bankruptcy case and those not);
- (9) Information on whether tax returns and tax payments since the date of the order for relief have been timely filed and made;
- (10) Payments made on pre-petition debt, other than in the normal course of business, to secured creditors or lessors;

- (11) Payments made outside the ordinary course of business without court approval;
 - (12) Payments made to or on behalf of insiders;
 - (13) Postpetition borrowing;
 - (14) Insurance information, including workers' compensation, casualty/property, and general liability;
 - (15) Information on whether disclosure statements and plans of reorganization have been filed with the court; and
 - (16) Information regarding the payment of quarterly fees to the United States Trustee.
- (c) *Individual chapter 11 debtors.* Individual chapter 11 debtors, in addition to the other provisions of the MOR, must complete Part 8 reserved for individual debtors, which includes the following:
- (1) Total income during the reporting period, including income from salary, wages, self-employment, and any other source;
 - (2) Total expenses during the reporting period, including expenses related to self-employment, and unusual or significant unanticipated expenses;
 - (3) Difference between total income and total expenses;
 - (4) Debts that are not related to self-employment that were incurred since the petition filing date, which are past due; and
 - (5) Statement of whether all domestic support obligation payments required under 11 U.S.C. 1129(a)(14) have been paid.

(d) *Supporting MOR documents.* At the discretion of the United States Trustee, the debtor or trustee may be required to submit to the United States Trustee, creditors' committee, or any party in interest the following documentation:

(1) Statement of Cash Receipts and Disbursements that shows all cash receipts and cash disbursements for all bank and investment accounts;

(2) Balance Sheet containing the summary and detail of the assets, liabilities, and equity (net worth) or deficit of the debtor. The debtor's pre-petition liabilities and retained earnings must be reported separately from the debtor's postpetition liabilities and retained earnings;

(3) Statement of Operations (Profit or Loss Statement) that compares the debtor's actual performance with projected performance;

(4) Accounts Receivable Aging, which is an aged summary of accounts receivable including total receivables, net of doubtful accounts;

(5) Postpetition Liabilities Aging, which is an aged summary schedule of postpetition liabilities segregated by general payables, amounts owed to professionals, taxes, etc.;

(6) Statement of Capital Assets that identifies the book value of all capital assets on the date of filing the petition, the book value at the beginning of the reporting period, any additions or deletions including depreciation, and the book value at the end of the reporting period;

(7) Schedule of Payments to Professionals that identifies all fees and expenses for all professionals employed in the bankruptcy case;

(8) Schedule of Payments to Insiders that includes all payments made by the debtor to any person or entity considered an insider under 11 U.S.C. 101(31);

(9) Bank Statements and Bank Reconciliations that reflect all bank accounts and banking transactions;

(10) Descriptions of assets sold or transferred outside the ordinary course of business, and the terms of such sales or transfers; and

(11) On a case by case basis, the United States Trustee may require the debtor or trustee to provide additional information including, but not limited to, cash disbursement register/ledger, statement of cash flows, real estate settlement documents, contracts or loan documents, and other records. In addition, other supporting documentation may be required if necessary to present a complete picture of the financial operations of the debtor's business.

(e) *Deadlines for filing/submitting MOR.* The MOR must be filed with the court and submitted to the United States Trustee on a monthly basis. Each MOR must be filed between the 21st day and the last day of the month immediately following the reporting period covered by the MOR. The precise deadline for filing the MOR is determined by the United States Trustee's operating guidelines for the district in which the case is pending. The MOR must be filed every month until one of the following occurs:

- (1) The confirmation of a plan of reorganization;
- (2) The conversion of the case to chapter 7; or
- (3) The dismissal of the case.

(f) *UST Form 11- PCR, Post-confirmation Report.* Following the confirmation of a plan of reorganization, reorganized debtors and any trustees who have been charged with administering a confirmed plan must file with the court and serve upon the United States Trustee, and any governmental unit charged with responsibility for collection or determination of any tax

arising out of such operation, post-confirmation reports using UST Form 11-PCR. The PCR must contain the following:

(1) Date the petition was filed and the date of plan confirmation;

(2) Summary of all post-confirmation amounts disbursed. This summary must be divided into disbursements during the most recent reporting period and total disbursements since the date of the confirmation order;

(3) All pre-confirmation professional fees approved by the court in the case for the most recent period and cumulatively since the date of the order for relief (separately reported, for the professional fees incurred by or on behalf of the debtor, between those that would have been incurred absent a bankruptcy case and those not);

(4) Information regarding the recoveries of holders of claims under confirmed plans. This information must be expressed in aggregate dollar values and, in the case of claims, as a percentage of total claims of the class allowed;

(5) Information on whether a final decree has been entered or anticipated to be entered; and

(6) Information regarding the payment of quarterly fees to the United States Trustee.

(g) *Deadlines for filing/submitting PCR.* The PCR must be filed with the court and submitted to United States Trustee on a quarterly basis. Each PCR must be filed not later than the 21st day following the last day of the reporting (previous) quarter. The PCR must be filed every quarter until one of the following occurs:

(1) The date of the final decree;

(2) The conversion of the case to chapter 7; or

(3) The dismissal of the case.

(h) *Accounting methods.* Generally Accepted Accounting Principles (GAAP) are required to be used when completing these Periodic Reports, except as modified by the United States Trustee or by an order of the court. Additionally, the accrual basis method of accounting must be used unless the cash basis method was used by the debtor prior to filing the petition. In such cases, those sections of the Periodic Reports utilizing cash basis method must be clearly identified. Supporting documents must comply with GAAP as determined by the United States Trustee, such as Statement of Position 90-7, “Financial Reporting by Entities in Reorganization Under the Bankruptcy Code,” as amended, when applicable, which was issued by the American Institute of Certified Public Accountants on November 19, 1990.

(i) *Certification of Periodic Reports’ accuracy.* The Periodic Reports must be certified under penalty of perjury that they are true and accurate by an individual who is authorized under applicable law to certify on behalf of the debtor or trustee. The debtor’s or trustee’s attorney must maintain possession of the Periodic Reports with original signatures for five years, unless otherwise provided in local court rules. A *pro se* debtor must submit the Periodic Reports with original signatures to the Office of United States Trustee that is responsible for supervising the case.

(j) *Mandatory usage of Periodic Reports.* The Periodic Reports must be utilized by debtors and trustees when completing their monthly operating reports or post-confirmation reports. All debtors and chapter 11 trustees serving in districts where a United States Trustee is serving must use the Periodic Reports in the administration of their cases, in the same manner and with the same content, as set forth in this Rule.

(1) All Periodic Reports may be electronically or mechanically reproduced so long as the content and the form remain consistent with the Periodic Reports as they are posted on EOUST's website; and

(2) The Periodic Reports shall be filed via the United States Bankruptcy Courts' Case Management/Electronic Case Filing System (CM/ECF) as a "smart form," meaning the reports are data-enabled.

Dated: October 24, 2014

Clifford J. White III
Director
Executive Office for United States Trustees

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